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In The

Supreme Court of the United States

SMEDVIG TANKSHIPS, LTD., SMEDVIG TANKSHIPS (AGENCIES), LTD., SMEDVIG TANKSHIPS MANAGEMENT, LTD., SMEDVIG TANKSHIPS, A.S., A/K/A SMEDVIG TANKREDERI A.S., PEDER SMEDVIG, A.S., PEDER SMEDVIG SINGAPORE, PTE., LTD., K.S. SMEDVIG TANKERS V, AND K.S. SMEDVIG TANKERS VI,

Petitioners,

vs.

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Circuit, State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

A. THE LOWER COURTS USED THE PROPER LEGAL ANALYSIS IN FINDING THAT UNITED STATES LAW APPLIED TO THE INSTANT CASE 2

B. THE FORUM SELECTION CLAUSE IS NOT ENFORCEABLE BECAUSE THERE WAS A CLEAR SHOWING MADE THAT THE ENFORCEMENT WOULD BE UNREASONABLE AND UNJUST 18

C. THE COURT UTILIZED THE PROPER STANDARD TO DETERMINE FUTURE MEDICAL CARE 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

Amoco Overseas Oil v. Compagnie Nationale Algerienne, 605 F.2d 648 (2d Cir. 1979) 17

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 2

Barcelona v. Sea Victory Maritime, Inc., 619 So.2d 741 (La.App. 4th Cir. 1993) 18

Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2nd Cir. 1959), *cert. denied*, 359 U.S. 1000 (1959) 6

Boyd v. Grand Trunk, W.R. Co., 338 U.S. 263 (1949) 21

M/S Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972) 2, 18, 19, 21, 22, 25

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 588 (1991) 22, 25

Duncan v. Thompson, 315 U.S. 1 (1942)..... 21

Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970) .... *passim*

Hernandez v. M/V Rajaan, 841 F.2d 582 (5th Cir. 1982)..... 24

Lauritzen v. Larsen, 345 U.S. 571 (1953) ..... *passim*

Lejano v. K.S. Bandak, 97-0388 (La. 12/12/97), 705 So.2d 158, *rehearing denied*, (La. 327 98), *cert. denied*, ___ U.S. ___ (1998) 22

In re Louisville Underwriters, 134 U.S. 488 (1890) 17

Marinechance Shipping, Ltd. v. Sebastian, 143 F.3d 216 (5th Cir. 1998), *cert. denied*, ___ U.S. ___ (1998) 22

TABLE OF AUTHORITIES – Continued

Page

Milstead v. Diamond M. Offshore, Inc., et al., 95-2446 (La. 7/2/96) 676 So.2d 89 (1996) 3

Prado v. Sloman Neptun Schiffahrts, A.G., 611 So.2d 691 (La.App. 4th Cir. 1992) 18

In re Ross, 140 U.S. 453 (1891) 15

Sosa v. M/V Largo Izaball, 736 F.2d 1028 (5th Cir. 1984) 23

Trans-Asiatic Oil, Ltd. v. Apex Oil Company, 743 F.2d 956 (5th Cir. 1984) 17

Young v. Steamship Co., 105 (15 Otto.), U.S. 41 (1882) 10

STATUTES:

45 U.S.C. § 55 ..... 20, 21

46 U.S.C. § 688 ..... 4, 16

MISCELLANEOUS:

Gilmore & Black, *The Law of Admiralty*, 2d Edition (1975) 4, 15

Louisiana Constitution of 1974: Art. 5, Sects. 5(C) and 10(B) 3

Norris, *The Law of Seamen*, 4th Edition (1985), § 6.1, p. 176, "The Employment Contract" 10

Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2d Edition Practitioner Treatise Series, Volume 1 ..... 8, 10

William Tetley, *International Conflicts of Law*, International Shipping Publications (1994), p. 213 7

STATEMENT OF THE CASE

The petition misstates the relevant facts.

Petitioners' statement of the case is insufficient, and in many instances, contrary to the evidence before the trial court and the Louisiana Fourth Circuit Court of Appeal. Both courts carefully and diligently reviewed and analyzed the evidence, which consisted of 70 joint exhibits. The evidence included more than 1,000 pages of documents, the testimony of 23 witnesses, 14 testifying for plaintiff (six by deposition), and nine testifying for the defendants (four by deposition).

Respondent is Nestor Abuan, a U.S. citizen. In July of 1993, a Florida court appointed Mr. Abuan as guardian of Carlos Valdez. On May 26, 1993, while working as an engine room cadet aboard the M/T Vestri, Mr. Valdez suffered multiple injuries resulting in permanent brain damage, when a crane in the engine room collapsed and a piston fell on him. He was on a voyage off the Florida coast, in U.S. commercial waters, between Houston, Texas and Philadelphia, Pennsylvania. After the accident, the U.S. Coast Guard airlifted Mr. Valdez to Florida for medical treatment. In October of 1994, pursuant to the recommendation of Mr. Valdez' attending physicians, and pursuant to the order of the probate court in Florida, Mr. Valdez was transferred to the Rehabilitation Living Center in New Orleans, Louisiana, for continuing medical treatment, where Mr. Valdez has resided permanently.

The trial court found that U.S. law was applicable in this litigation. The trial court also found that while forum selection clauses are prima facie valid, the evidence in the instant case established that the forum selection clause

was overreaching and should not be enforced, based upon this Court's decision in *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972). Finally, the trial court found that using U.S. standards was proper in determining future medical care. The appellate court affirmed all these findings, based upon the evidence in the record.

REASONS FOR DENYING THE WRIT

In the instant case, the Louisiana courts decided the legal issues of choice of law and choice of forum in accordance with federal law and federal standards. The standards used by the Louisiana courts do not conflict with the decision of any other state court of last resort or of a United States Court of Appeal nor with any holding of this Court.

A review of the decisions by the Louisiana courts reveals that Petitioners have never argued that the "choice of law" or "choice of forum" criteria utilized by the Louisiana courts conflicted with decisions by this Court or any appellate courts and reveal that Petitioners have only argued that the Louisiana courts erred in the factual conclusions reached in the application of this Court's well-established precedents. The arguments raised by the Petitioners have always been directed at the factual conclusions reached by the Louisiana courts. However, the findings by the Louisiana courts were amply supported by the evidence in this particular case. Petitioners would have this Court violate its holding in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) wherein this Court emphasized the great deference to be

given to the findings of fact of a trial court. Also, it is important for this Court to note that Louisiana appellate courts' scope of review extends to issues of both law and fact and the Louisiana Supreme Court has held that the appellate review of facts extends to maritime cases. *See*: Art. 5, Sects. 5(C) and 10(B), Louisiana Constitution of 1974, *Milstead v. Diamond M. Offshore, Inc., et al.*, 95-2446 (La. 7/2/96) 676 So.2d 89 (1996). In the instant case, the appellate court reviewed the factual findings of the trial court twice, first upon denial of Petitioners' Writ Application on June 24, 1994 and secondly upon the appeal subject of their current application for a petition for writ of certiorari.

Petitioners' third argument complaining of an improper standard of damages only attacks the factual findings of the Louisiana courts. This Court should defer to those factual findings.

Respondent will now address the choice of law factors as set forth by this Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970) beginning with the two factors complained of by Petitioners.

A. THE LOWER COURTS USED THE PROPER LEGAL ANALYSIS IN FINDING THAT UNITED STATES LAW APPLIED TO THE INSTANT CASE

Petitioners complain that the Louisiana courts erred in failing to follow " . . . a specific clause requiring that Norwegian law apply" in Mr. Valdez' contract of employment and further failing to follow the law of the flag,

which they allege to be Norwegian and not a flag of conveniens. However, a choice of law analysis in admiralty and maritime cases such as this, and the applicable substantive law, is determined by evaluating all eight factors set forth in *Lauritzen/Rhoditis*, and not merely the two factors argued by Petitioners. In the instant case, the trial court correctly concluded that an analysis of these eight factors under the particular facts of Carlos Valdez' case mandated the application of the Jones Act, 46 U.S.C. § 688 and the General Maritime Law of the United States. Petitioners merely argue that the trial court should have accepted their version of the "facts" instead of the evidence in the record.

Lauritzen, which was decided by this Court in 1953, set forth seven factors for the court to weigh in its choice of law analysis. These factors are summarized in Gilmore & Black, *The Law of Admiralty*, 2d Edition (1975), as follows:

1) Place of the Wrongful Act;
2) The Law of the Ship's Flag;
3) The Allegiance or Domicile of the Injured Seaman;
4) The Allegiance of the Shipowner;
5) The Place of the Contract, i.e. Where the Shipping Articles were Signed;
6) Inaccessibility of a Foreign Forum; and
7) The Law of the Forum.

Thereafter, in 1970, this Court added an eighth factor in *Rhoditis*, namely the shipowner's base of operations, and noted that there might indeed be other factors:

> " . . . the shipowner's *base of operation* is another factor of importance in determining whether the Jones Act is applicable; and there may well be others . . .
>
> We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner , engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations of a Jones Act 'employer.' "

The *Rhoditis* shipping articles of that Greek flagged vessel contained both a forum selection clause and a choice of law clause mandating a Greek forum and Greek law. It was conceded that Rhoditis, a citizen of Greece, could have obtained relief against the Greek shipowner under Greek law in the Courts of Greece. An action was brought in federal district court in Louisiana and the court found that 95% of the stock of the Greek corporation was owned by a Greek citizen who was a resident of the United States and who managed the corporation out of offices in New York and New Orleans. This Court held that the shipowner's extensive business operation in this country was sufficient to mandate the application of American law.

Respondents will now apply the following *Lauritzen/ Rhoditis* factors to the facts of this case, thereby clearly establishing that the trial court's findings were not only supported by the record in this proceeding, but that the trial court was absolutely correct in deciding to apply U.S. law:

(i) Law of the Flag.

In *Lauritzen*, this Court found United States law not applicable in a case involving a Danish seafarer serving on board a Danish flag vessel, owned by a Danish corporation, whose seaman's contract had been signed in his home country, and provided for the application of Danish law and a Danish forum. The flag of the vessel was not a flag of convenience, but rather the traditional Danish flag. In the instant case, the M/T Vestri did not fly the traditional flag of Norway, but flew the NIS (Norwegian International Ship Registry) flag, which the trial court found factually to be a flag of convenience. On July 1, 1987, Norway amended its laws to compete with open registry, or "flag of convenience" countries such as Panama and Liberia and to authorize the hiring of crew members from third world countries. The law of the vessel's flag, usually of "cardinal importance", is not applicable if the flag is merely one of convenience or if "in the totality of the circumstances" there are substantial and continuing contacts between the alien owner and the United States. *Rhoditis* at 310; *Lauritzen* at 582, 584, 586, 587; *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 439 (2nd Cir. 1959), *cert. denied*, 359 U.S. 1000 (1959), 3 L.Ed.2d 1030, 79 S.Ct. 1138.

The flag of the M/T Vestri is a "flag of convenience". A traditional flagged vessel, as opposed to a flag of convenience, is owned, operated, and managed by the domicilaries of the country of the vessel's flag, hires its crew members from the owner's domicile, pays taxes to that country, and adheres to that country's safety standards. The evidence in the instant case clearly established and the trial court found that the NIS flag flown by the

M/V Vestri was a flag of convenience. The parent company that owned the M/T Vestri is a Bermuda corporation and the vessel was transferred to a Liberian corporation the day of the accident. The company was structured so it would pay no taxes to Norway, nor to any other country in the world. (" . . . the Directors intend to conduct the affairs of the company so that it does not become resident in Norway for taxation purposes. **Accordingly and provided that the company does not participate in activities which are managed or controlled from Norway, the company will not be subject to Norwegian income tax or corporation tax.**") (Prospectus at Page 43-44) (Emphasis added) The 31 crew members on board the M/T Vestri consisted of 19 Filipinos, five Indians, four Croatians, one Burmese, one Polish and one Norwegian. The M/T Vestri had never even been to Norway, much less the Philippines, trading exclusively with the United States where it earned 100% of its income. It is now a matter of hornbook law that flags such as Liberia, Panama, and the second flag of Norway (NIS) are flags of convenience. As stated by Professor William Tetley in *International Conflicts of Law*, International Shipping Publications (1994), p. 213:

> "A flag of convenience is a flag flown by a ship registered in one state, with which the ship has few or no connections, while in reality the ship is owned in, or operated from, another state. A flag of convenience usually exists for economic reasons – shipowners often seek to avoid high taxes, maintenance costs, certain international conventions and the obligation to hire certain

> nationals. It is estimated that flags of convenience accounted for 40% of the world's ships in 1986." (Footnotes omitted.)

In *Admiralty and Maritime Law*, 2d Edition, Practitioner Treatise Series, Volume 1, Section 2-21, "Ship Registration and Nationality", p. 47, Professor Schoenbaum agrees, stating:

> ". . . . Controversy over the genuine link requirement has centered on so-called 'flags of convenience' or 'open registry' states. These are various nations that allow ownership and control of its vessels by non-citizens, maintain easy access to registry, levy low taxes and registry fees, and freely permit manning of vessels by non-nationals."

The Petitioners certainly achieved the hornbook definition of a "flag of convenience". They were successful in avoiding taxes in Bermuda, Norway, United Kingdom (and everywhere else in the world), and the obligation to hire high-cost Norwegian seamen by having a crew of Third World seamen. Professor Tetley further notes that "the law of the flag" is of no importance in an action involving a flag of convenience vessel:

> "But of what importance is the flag today in a world of flags of convenience, where, for example, many Greek ships do not fly the Greek flag? What is the value of the law of the flag where there is double flagging, flagging out and one ship, foreign, shell corporations? The result is that the courts are piercing (or lifting) the corporate veil for all of the above reasons and more. . . .

* * *

> The law of the flag is a most 'venerable institution', as was stated in 1959 [sic] by the Supreme Court of the United States in *Lauritzen v. Larsen*, but it is less venerated today, with 40% of the world's international fleet under flags of convenience. And the Supreme Court said in 1959 [sic] in *Lauritzen* that the flag was only the second of seven contacts to be taken into consideration. What would the Supreme Court say today?" *Tetley, supra*, at pp. 582-583.

Again, Professor Schoenbaum agrees that the law of a flag is of lesser importance, even in a traditional ownership case, as opposed to a flag of convenience:

> "The importance of each of the eight enumerated factors varies with the circumstances, and they will not have equal weight. The factors that are usually stated to be most important are: (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the defendant shipowner or operator; (6) whether a foreign forum is available; and (8) the defendant shipowner's base of operations. These factors correctly emphasize the interests and contacts of the parties and the national interests of the respective countries involved."

Based upon the evidence in the record, the trial court was certainly correct in its finding in this case that " . . . the flag of the vessel is not of critical importance and does not mandate application of that country's law." (Petitioners' Appendix 46a) In its *de novo* review of both law and facts, the Appellate Court was certainly correct in likewise finding "The court found that the evidence supported the conclusion that the NIS flag of the Vestri

was a flag of convenience, and, therefore did not mandate the application of Norwegian law." (Petitioners' Appendix 16a, 17a)

(ii) The Place of the Contract, i.e. Where the Shipping Articles were Signed.

The petitioners mistakenly contend that the plaintiff's contract of employment was the Philippine Overseas Employment Contract signed by Mr. Valdez to obtain an exit visa from the Philippines, or the Norwegian individual contract required by the shipowner, or the collective bargaining agreement between the shipowner and the union to which Mr. Valdez did not even belong. None of these documents comprise Mr. Valdez' contract of employment. The law has been established for hundreds of years that a seaman's contract of employment consists of the shipping articles. That remains to be the law according to not only all the U.S. authorities, but likewise the law of every civilized country in this world. *See*: Norris, *The Law of Seamen*, 4th Edition (1985), § 6.1, p. 176, "The Employment Contract". International law recognizes that the shipping articles are the contract of employment as established by International Labor Organization No. 22, a Convention to which Norway is a signatory and which is in evidence. All authorities agree that the shipping articles are the seaman's contract of employment. *See*, Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2d Edition (1994), Vol. 1, p. 242; *Young v. Steamship Co.*, 105 (15 Otto.), U.S. 41 (1882).

Mr. Valdez signed on board the M/T Vestri at Philadelphia, Pennsylvania, at which time U.S. and international law required that he execute the shipping articles which comprise his contract of employment. Petitioners have never produced the shipping articles, despite being requested to do so during discovery, and, as such, the law presumes that the information contained therein would be adverse to defendants' position. The place where the shipping articles were signed, the United States of America, clearly supports the application of U.S. law.

In the instant case, the evidence adduced at the trial clearly established that a "choice of law" clause was not enforceable either in Norway or the Philippines. Moreover, after petitioners filed their Petition for Certiorari with the Louisiana Supreme Court, the Solicitor General of the Republic of the Philippines filed an "Amicus Curiae Brief on behalf of the Republic of the Philippines", specifically stating that Philippine law did not enforce forum selection clauses and urged the Louisiana Supreme Court to affirm the award in favor of Mr. Abuan, on behalf of Carlos Valdez. (Appendix 1a-42a)

(iii) Base of Operations.

Petitioners are not a "Norwegian shipowner/employer" as stated in their brief. The evidence established that the parent company which owned the M/T Vestri was Smedvig Tankship, Ltd., which was incorporated on April 27, 1993, in Bermuda, as a reorganization of the Smedvig Shipping interests. The Smedvig Group consists of all nine entities that were cast in judgment, which were either the owner or owner *pro hac vice* of the

M/T Vestri on the date of the accident. As part of the reorganization of April 27, 1993, the M/T Vestri was sold on the day of the accident to Vestri, Inc., a Liberian corporation, that was wholly owned by defendant Smedvig Tankships, Ltd., the Bermuda parent corporation. The ownership of the Bermuda corporation, Smedvig Tankships, Ltd., resides with the nationals of many countries, including the United States. Stock in Smedvig Tankships, Ltd., was sold to United States' citizens through Net West Securities, Ltd., pursuant to Rule 144(a) of the United States Securities Act of 1933. Petitioner, the owner of the M/T Vestri, was formed with the specific intention of exploiting the U.S. market and earning its income from the U.S. market, as set forth on Page 10 of its Prospectus introduced into evidence.

> "The group intends to exploit the opportunities for trade in the United States where the directors believe that the quality of both vessels and operators will become increasingly important."

The Petitioners were successful in their proposed business plan. At the time of the accident, the M/T Vestri was under charter to Amoco, the American Standard Oil Company, which is based in Chicago, Illinois. Amoco controlled the M/T Vestri's movements and all of the income of the M/T Vestri was earned by trading in the U.S. Carlos Valdez was injured after the vessel left Houston, Texas, and was in route to Philadelphia, Pennsylvania. The owner of the M/T Vestri, Smedvig Tankships, Ltd., has longstanding relations with major U.S. oil companies which consisted of obtaining medium term charters. Two prominent Americans served on and constituted 40% of the board of directors of Smedvig Tankships,

Ltd. The M/T Vestri *never* traveled to Norway nor the Philippines as it was always engaged in commercial activities in the United States. It is also clear that Petitioners specifically intended to avoid the application of Norwegian law. As noted in the Company's Prospectus at Pages 43-44 "Taxation".

> " . . . the directors intend to conduct the affairs of the company so that it does not become resident in Norway for taxation purposes. Accordingly and provided that the company does not participate in activities which are managed or controlled from Norway, the company will not be subject to Norway income tax or corporate tax."

Not only was the shipowner not based in Norway as it successfully avoided taxation of that country, the same evidence established that it was not based in Bermuda or the United Kingdom, where it also avoided taxation:

> " . . . There is no Bermuda income tax, corporation or profits tax, withholding tax, capital gains tax, capital tax, capital transfer tax, state duty or inheritance tax payable by the company or its shareholders . . . ; This will include conducting the affairs of the company so it does not become a resident of the United Kingdom for tax purposes;" (Prospectus, pp. 43-44)

The only activities of the Petitioners in the Philippines were to obtain some of the crew members through a manning agent in Singapore. The Petitioners maintained an equal presence in other countries where crew members were obtained for the M/T Vestri, including India (there were five Indian crew members), Crotia (four Croatian crew members), Burma (one Burmese crew member)

and Poland (one Polish crew member). The facts as found by the district court clearly support the conclusion that the shipowner's base of operations was in the United States of America where it earned all of its income and successfully accomplished its mission to "exploit the American market". As in *Rhoditis*, there is " . . . no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over American citizens engaged in the same business by allowing him to escape the obligations of a Jones Act 'employer'." While this defendant's base of operations in the U.S. is sufficient for the imposition of U.S. law, the other *Lauritzen* factors likewise support the trial court's finding that U.S. law applied to this case.

(iv) The Place of Wrongful Act.

The accident in question occurred in the Straits of Florida after the vessel had sailed from Houston, Texas, in route to Philadelphia, Pennsylvania. The U.S. Coast Guard transported Mr. Valdez to the hospital in Florida where he remained until being placed in the Rehabilitation Hospital in New Orleans, Louisiana.

(v) The Allegiance or Domicile of the Injured Seaman.

The named plaintiff, Nestor Abuan, the curator of Carlos Valdez, is a United States citizen. Carlos Valdez was interdicted in Dade County, Florida, and the guardianship proceedings were subsequently transferred to Louisiana. The interdict, Carlos Valdez, is a citizen of the

Republic of the Philippines, but is domiciled in Orleans Parish, State of Louisiana, and is a resident and domiciliary of the United States where he will be confined at a rehabilitation hospital in Louisiana for the remainder of his life. The testimony was unanimous that Carlos Valdez has the mentality of an eight to nine year old child. The court specifically found that there were no long term rehabilitation facilities available in the Philippines and that the environment offered by Carlos' mother's home was completely inappropriate as the home had " . . . no electricity, sewerage, or running water and she uses petroleum gas to light the house and firewood to cook." (Petitioners' Appendix 82a) The court further noted that Carlos intends to remain permanently in the U.S. where he has remained continuously since the date of the accident. (Petitioners' Appendix 50a, 84a) Gilmore & Black, supra, Page 476, specifically notes that American law should be applied not only to American citizens but " . . . to American 'domicilaries' whether they serve on American flag or foreign flag ships and no matter where they may be injured." Gilmore & Black further note that this Court specifically held that the United States has a "legitimate interest" in its "permanent inhabitancy" sufficient to apply American law citing this Court's decision of *In re Ross*, 140 U.S. 453 (1891). The fact that Mr. Valdez is domiciled in the United States, is being treated in a Rehabilitation Hospital in Louisiana and a U.S. citizen acts as curator in a Louisiana interdiction proceeding, all weigh in favor of the application of U.S. law.

(vi) The Allegiance of the Shipowner.

At best, the allegiance of this shipowner is to itself and certainly not Norway or the Philippines. The parent company is domiciled in Bermuda and on the day of the accident, its wholly owned subsidiary and named owner of the vessel was domiciled in Liberia. The other subsidiaries are based in the United Kingdom, Singapore, and Norway, all countries to which there was certainly no allegiance as Petitioners intentionally avoided sufficient contacts with those countries to avoid the imposition of those countries' laws. United States citizens are shareholders of defendant's corporate entity. The corporation is regulated by the U.S. Securities & Exchange Commission, and two U.S. citizens serve as directors of Petitioners' corporate entity.

(vii) Inaccessibility of a Foreign Forum.

The trial court expressly found that there was no foreign forum available to the plaintiff. (Petitioners' Appendix 52a) The trial court's finding is clearly supported by the evidence in the record.

(viii) The Law of the Forum.

The law of the forum is the United States maritime law, namely the Jones Act, 46 U.S.C. § 688 and the United States General Maritime Law. The trial judge correctly held that this nation has the only significant interest in applying its laws to this controversy:

> "As has been discussed, all of the plaintiff's treating medical witnesses, and medical evidence are located in the United States. The

> Plaintiff has decided to remain in permanent residential care in this country. Because of the particular facts already discussed in connection with the eight factors, the Philippines has little public interest in the resolution of this claim. Louisiana does have an interest in its resolution in order to insure the effectuation of the principles behind the Jones Act and general maritime law." (Petitioners' Appendix 50a)

The petitioners completely ignore both the fact and the well established law that a transnational shipping company should be expected to be sued wherever its vessels can be found, even when the shipowner does not have the substantial, overwhelming contacts that are present in this case. The fact of the matter is that a maritime shipowner which is engaged in international maritime commerce is *always* aware of the risk that it may be haled into court in a distant forum. *Trans-Asiatic Oil, Ltd. v. Apex Oil Company*, 743 F.2d 956 (5th Cir. 1984). *In re Louisville Underwriters*, 134 U.S. 488, 493, 10 S.Ct. 587, 589, 33 L.Ed. 991 (1890). Thus, the Second Circuit has stated that, "[b]ecause the perpetrators of maritime injury are likely to be peripatetic . . . maritime actors must reasonably expect to be sued where their property may be found." *Amoco Overseas Oil v. Compagnie Nationale Algerienne*, 605 F.2d 648, 655 (2d Cir. 1979).

The proper legal analysis was used by all of the Louisiana courts in this case. Petitioners attack the Louisiana courts' factual conclusions. The evidence in this case consists of expert testimony on both Philippine and Norwegian law which supported the trial court's conclusion that United States law, Philippine law and Norwegian law are essentially the same. Therefore, no

"conflict" of law exists and the results would have been the same under any applicable body of substantive law.

B. THE FORUM SELECTION CLAUSE IS NOT ENFORCEABLE BECAUSE THERE WAS A CLEAR SHOWING MADE THAT THE ENFORCEMENT WOULD BE UNREASONABLE AND UNJUST

Petitioners failed to mention that the enforceability of the forum selection clause was considered not once, but twice by the trial court and then two times by the court of appeal. After an extensive hearing on November 8, 1994, the trial court denied defendants' exceptions and request for dismissal on forum non conveniens or a forum selection clause, and preliminarily held United States' law applicable to this proceeding. (Appendix 43a-44a) At that hearing, the trial court considered the *Lauritzen/Rhoditis* factors as to choice of law and the *Bremen, Prado, and Barcelona*[1] decisions as to the enforceability of a forum selection clause. The trial court found that it would be "factually ridiculous" to enforce a forum selection clause in this particular case. (Appendix 47a) On July 25, 1995, the appellate court denied Petitioners' writ application stating in part:

> "The trial court made a factual finding in light of *Bremen v. Zapata* that distinguished the case at bar . . . " (Appendix 49a)

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[1] *Bremen, supra; Prado v. Sloman Neptun Schiffahrts, A.G.*, 611 So.2d 691 (La.App. 4th Cir. 1992); *Barcelona v. Sea Victory Maritime, Inc.*, 619 So.2d 741 (La.App. 4th Cir. 1993).

At the trial in September of 1995, the trial court again evaluated the alleged forum selection clause in accordance with *M/S Bremen v. Zapata, supra,* stating:

> " . . . The results of this Court's analysis is this matter can best be summarized by language from *M/S Bremen v. Zapata*, 92 S.Ct. 1907 (1972), found at 1913, wherein the court found that the justification for allowing a seaman to avoid a forum selection clause is that:
>
> > ' . . . the trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'
>
> Such a result is guaranteed were the Plaintiff in this matter compelled to seek relief where the Defendants would have him compelled to do so . . . " (Petitioner's Appendix 52a)

The appellate court affirmed the decision of the trial court on June 24, 1998. The court of appeal correctly applied the standards set forth in *M/S Bremen v. Zapata Offshore Co., supra*:

> As the Supreme Court noted in *Lejano*, ". . . . according to *The Bremen*, a forum selection clause should be enforced **absent a clear showing that enforcement would be unreasonable and unjust**, or that the clause is invalid for such reasons as fraud or overreaching. (emphasis added; citation omitted)." *Id.* at p. 15, 705 So.2d at 167. (Petitioner's Appendix 8a)

All of this Court's decisions make it clear that a forum selection clause should not be enforced when it would be unreasonable, unjust, overreaching or deny plaintiff his day in court. That is the standard applied by

the Louisiana courts. The facts of this case justify both the trial court and appellate courts' refusal to enforce any of the alleged forum selection clauses.

On March 27, 1993, Carlos Valdez was employed as an engine room cadet, and his salary was $214.00 per month, a rate well below the minimum prescribed by the International Labor Organization for regular seamen and well below the rates of pay stipulated in the Collective Bargaining Agreement that petitioners' claim is applicable to this litigation. The evidence established that Carlos Valdez had never been to sea before, was not a member of any union, was not a "regular seafarer", but instead was a cadet who was required to sign an affidavit acknowledging that he was not a regular crew member. The testimony of Carlos Valdez establishes that the individual employment contract relied upon by petitioner was blank when Mr. Valdez was required to sign it. Additionally, the Collective Bargaining Agreement that petitioners' claim is applicable to this litigation contains a list of seamen covered by the Collective Bargaining Agreement in its appendix and Carlos Valdez' name does not appear on that list. The Petitioners refused to provide the shipping articles executed by Carlos Valdez in Philadelphia which contained no forum selection clause or choice of law clause which legally constituted his contract of employment.

The Jones Act expressly incorporates the Federal Employees Liability Act (hereinafter FELA) and Section 5 of the Act, 45 U.S.C. § 55 provides in pertinent part:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself

> from any liability created by this Act, shall to that extent be void . . . ".

In *Bremen, supra,* this Court stated unequivocally that forum selection clauses were not enforceable as a matter of public policy in certain circumstances such as where prohibited by statute or decision. This is the situation in FELA cases and Jones Act cases:

> "A contractual choice – of – forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared or by statute or by judicial decision. See: e.g., *Boyd v. Grand Trunk W.R.. Co.,* 338 U.S. 263, 94 L.Ed. 55, S.Ct. 26 (1949)". *Bremen, supra,* at p. 15.

The *Bremen* decision simply reaffirms the long-standing rule that when United States law is applicable, either through statutory law such as the Jones Act, or the United States General Maritime Law, that the forum selection clause or any clause limiting the seaman's right in any document is unenforceable as a matter of law as against either the statutory scheme (*e.g.,* FELA) or public policy. In *Boyd v. Grand Trunk, W.R. Co.,* 338 U.S. 263 (1949), this Court specifically held that any agreement restricting the choice of venue awarded by the FELA incorporated into the Jones Act is null and void as being in conflict with the above provision. This Court cited *Duncan v. Thompson,* 315 U.S. 1 (1942) which held that a railway employee's rights may not be contractually limited due to the application of Section 5 of FELA.

In considering petitioners' writ application, the Louisiana Supreme Court had before it the amicus curiae brief of the Republic of the Philippines and the amicus brief of

the Norwegian Shipowner's Association. Simply stated, the Louisiana courts decided this case based upon clear evidence which proved that no forum selection clause was present in Mr. Valdez' contract of employment. The Louisiana courts did not misapply the relevant maritime standards, the Louisiana courts correctly applied the facts of this case and rendered judgment accordingly. This Court should not disturb the Louisiana courts' factual findings.

Petitioners' reliance upon *Lejano v. K.S. Bandak*, 97-0388 (La. 12/12/97), 705 So.2d 158, *rehearing denied*, (La. 327 98), *cert. denied*, ___ U.S. ___ (1998) is misplaced. In the instant case, both the trial court and appellate court distinguished *Lejano* factually and followed the federal standards of *Bremen* and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 588 (1991). Likewise, the evidence and record in *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216 (5th Cir. 1998), *cert. denied*, ___ U.S. ___ (1998) were entirely different from the evidence in record in the instant case. In the instant case, the trial court found the forum selection clause fundamentally unfair because the evidence established that not only was it not enforceable in either Norway or the Philippines, but that Carlos Valdez had no notice of the clause and that he carried his burden of proof that it should not be enforced in accordance with the standards set forth in *Bremen v. Zapata, supra.*

C. THE COURT UTILIZED THE PROPER STANDARD TO DETERMINE FUTURE MEDICAL CARE

Respondents argue that the future medical care should not have been awarded based on American standards because Carlos Valdez may not be able to remain permanently in the United States. The appellants' argument is factually and legally incorrect. In the instant case, the court looked to the evidence to determine the amount of damages regardless of the standard utilized. In the instant case, the evidence established that the cost of pertinent care in the Rehabilitation Living Center would be $6,300,000.00. The trial court, based upon the testimony of numerous experts, awarded $3,000,000.00, a figure that was between the cost of residential care at the Rehabilitation Living Center and the cost of home care. Moreover, the court noted " . . . this award is consistent with the plaintiff's evidence of the cost of future care for Mr. Valdez in the Philippines." (Petitioners' Appendix 25, FN 17) Therefore, regardless of the standard, American or Philippine, the award was based upon the evidence in the record in this particular case. Math is math, whether the computation of future care costs is in the Philippines or in the United States. In the instant case, the evidence of care in either country supported the award of $3,000,000.00.

Even if Respondent had not presented evidence, which he did, as to the cost of future care in the Philippines, the award would have been proper because of the finding that there were no adequate facilities in the Republic of the Philippines. In *Sosa v. M/V Largo Izaball*, 736 F.2d 1028 (5th Cir. 1984), the court held that future

medical awards are properly based on American standards if the trial court finds that there are no adequate facilities in the Republic of the Philippines:

> "The award for past and future medical expenses was, however, based on American standards; the district court was correct in so doing and that it specifically found that Sosa would not receive adequate medical care in Mexico. Memorandum and Order at 22."

Also, in *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir. 1982), the court held that future economic losses may be based on American standards even though there was no showing of inadequate services or facilities in the foreign country, if the plaintiff " . . . intended to reside permanently in the United States" and was "properly entitled to remain in the United States for his medical care."

As the Petitioners well know, Carlos Valdez is eligible for a medical parole to remain here indefinitely. *See* 14 INA, § 212(d)(5), 11 U.S.C. § 1182(d)(5); 8 C.F.R. § 253.1; Immigration and Naturalization Operational Instructions at OI 242.1(a)(22). District directors for the Department of Justice, Immigration and Naturalization Service, have wide latitude to grant general parole to persons such as Mr. Valdez, when such action is deemed to be in the public interest. The fact that Mr. Valdez now has the mental capacity of an eight year old child, that he cannot receive adequate medical care in the Philippines, and that he will not be a public charge whose medical care is paid for by U.S. taxpayers, shows that it would be in the public interest for him to remain here for his needed

permanent medical care. Moreover, the Petitioners completely misstate the law when they argue that plaintiff has the burden of proving "lawful entitlement to be present in the United States for all periods for which damages are sought." In support of this novel argument, Petitioners cite cases dealing with "back pay awards" dealing with violations of the National Labor Relations Act. Sufficed to say, it is impossible to "reinstate" a deported alien into his job in the United States, a country from which he has been deported.

CONCLUSION

Petitioners' application for a writ of certiorari does not remotely meet the standards imposed by Rule 10 of the Rules of the Supreme Court of the United States. The ruling of the trial court, court of appeal and Louisiana Supreme Court in no way conflicts with the decision of another state court of last resort or of a United States Court of Appeal or this Court. Instead, the decision of the Louisiana courts meticulously follows the teachings of this Court in *Lauritzen, Rhoditis, Bremen and Carnival Cruise Lines, Inc.*

Petitioners attempt to rewrite the record of this proceeding by referring to itself as a "Norwegian shipowner" when in truth and fact the record establishes that it was a Bermuda company that paid no taxes to anyone in the world, that it was formed solely to exploit the American market, with 40% of its directors being American citizens, and also with American shareholders and earning 100% of its income from the United States.

Respondents speak of contracts containing forum selection clauses, even though the contracts were in blank, the seamen had no notice of the forum selection clause and were not members of the union or named in the list of individuals covered by the collective bargaining agreement.

Respondents submit that Petitioners' request for a writ of certiorari should be summarily denied.

Respectfully submitted,

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SUPREME COURT

STATE OF LOUISIANA

DOCKET NO. 98-2608

NESTOR ABUAN, AS GUARDIAN ON BEHALF
OF CARLOS VALDEZ
Plaintiff-Appellee

VERSUS
SMEDVIG TANKSHIPS, LTD., ET AL.,
Defendant-Appellant

Amicus Curiae of the Republic of the Philippines
On Defendant Smedvig Tankships, Ltd/. et al.'s
Application for Writ of Certiorari
Directed to the Fourth Circuit Court of Appeal
Docket No. 96-CA-1013

On Appeal from the Twenty-Fifth
Judicial District Court
for the Parish of Plaquemines
Docket No. 38-719. Division "B"
Honorable William A. Roe, Presiding

PETITION TO FILE AMICUS CURIAE BRIEF OF THE REPUBLIC OF THE PHILIPPINES ON THE APPLICATION FOR WRIT OF CERTIORARI OF SMEDVIG TANKSHIPS, LTD., ET AL.

RESPECTFULLY SUBMITTED:

RICARDO P. GALVEZ
Solicitor General

AMY C. LAZARO-JAVIER
Assistant Solicitor General

ROMEO R. RAMOLETE
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Republic of the Philippines
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SUPREME COURT OF LOUISIANA

DOCKET NO. 98-2608

NESTOR ABUAN, AS GUARDIAN ON BEHALF
OF CARLOS VALDEZ
Plaintiff-Appellee

VERSUS
SMEDVIG TANKSHIPS, LTD., ET AL.
Defendants-Appellants

Interest of the Republic of the Philippines on
Defendant Smedvig Tankship Ltd., et al.,'s
Application for Writ of Certiorari Directed to
Fourth Circuit Court of Appeal
Docket No. 96-CA-1013

On Appeal from the Twenty-Fifth
Judicial District Court
For the Parish of Plaquemines
Docket No. 38-719, Division "B"
Honorable William A. Roe, Presiding

PETITION TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE REPUBLIC OF THE PHILIPPINES

The Republic of the Philippines respectfully petitions this Court for permission to file the attached Amicus Curiae Brief for the following reasons:

1.

The Republic of the Philippines has an interest in protecting the rights of its citizens, including but not limited to seafarers serving on board foreign flagged vessels that have contacts with many countries throughout the world.

2.

The Republic of tile [sic] Philippines is the largest provider of seamen to flag of convenience vessels than any other country in the world.

3.

The Republic of the Philippines has reviewed and studied the Opinion of the Court of Appeals for the Fourth Circuit, State of Louisiana, dated June 24, 1998 which correctly interpreted Philippine law that the forum selection clause is not enforceable in the Philippines.

4.

The Republic of the Philippines also reviewed this Honorable Court's decision dated December 12, 1997, in the case of *Lejano v. Bandak*, Docket No. 97-CC-0388, 705

So.2d 158 (La. 1997), wherein it denied a Filipino seaman access to the judicial system of the United States. It respectfully submits that in doing so, it misinterpreted Philippine laws and misconstrued the role and function of the Philippine Overseas Employment Administration. The Honorable Court erred in holding a forum selection clause in a standard Philippine Overseas Employment Administration employment contract to be enforceable under Philippine law.

5.

The Republic of the Philippines has an interest in seeing that our laws are properly interpreted specially [sic] when they are used as the basis of a Court decision.

6.

The Republic of the Philippines has a substantial, legitimate interest as it and/or its citizens will be affected by the outcome of this case and its implication in other cases involving other Filipino seamen before other Courts in the United States of America.

7.

The Republic of the Philippines requests this Honorable Court to affirm the decision of the trial court and the Court of Appeal in the above-captioned case.

WHEREFORE, Mover, the Republic of the Philippines, prays that it be granted leave to file the attached Amicus Curiae Brief.

Makati City, Philippines, October 21, 1998.

Respectfully submitted,

/s/ Ricardo P. Galvez
RICARDO P. GALVEZ
Solicitor General
IBP No. 463184, Jan. 7, 1998

/s/ Amy C. Lazaro-Javier
AMY C. LAZARO-JAVIER
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/s/ Romeo R. Ramolete
ROMEO R. RAMOLETE
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IBP No. 365312, Jan. 25, 1994

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SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 98-2608

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ
Plaintiff-Appellee

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL.
Defendant-Appellant

Amicus Curiae of the Republic of the Philippines
Relative to Defendant Smedvig Tankships, Ltd/. et al.'s
Application for Writ of Certiorari Directed to the Fourth
Circuit Court of Appeal Docket No. 96-CA-1013

On Appeal from the Twenty-Fifth Judicial District Court
for the Parish of Plaquemines Docket No. 38-719.
Division "B" Honorable William A. Roe, Presiding

AMICUS CURIAE BRIEF OF THE REPUBLIC OF THE PHILIPPINES ON THE APPLICATION FOR WRIT OF CERTIORARI OF SMEDVIG TANKSHIPS, LTD., ET AL.

RESPECTFULLY SUBMITTED:
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AMY C. LAZARO-JAVIER
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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT iv

INTEREST OF THE AMICUS CURIAE v

ARGUMENT 1

1. THE NATURE AND ROLE OF THE PHILIPPINE OVERSEAS EMPLOYMENT ADMINISTRATION 2

2. FORUM SELECTION CLAUSES NOT MUTUALLY ENTERED INTO BY THE PARTIES, ARE UNENFORCEABLE IN THE REPUBLIC OF THE PHILIPPINES 6

3. THE POEA CONTRACT 10

4. THE PUBLIC POLICY OF THE REPUBLIC OF THE PHILIPPINES 11

CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

CASES

Barcelona v. Sea Victory Maritime, Inc., 619 So.2d 741 (La. App. 4th Cir. 1993) 11

Javier v. Court of Appeals, 214 SCRA 572 (1992) 15

Laquian v. Baltazar, 31 SCRA 552 (1970) 16

Lejano vs. K.S. Bandak, No. 97-CC-0388 1

Leonardo A. Cuizon v. Kedma, Ltd., Joshua Shipping Ltd., 96 civ. 0229 (SS) (Jan.29, 1997) 1, 18

McKenzie v. Cui, G.R. No. 48831 (Feb. 6, 1989) 13

Mercury Drug Co. v. Dayao, 117 SCRA 99..... 6

Philimare Shipping & Equipment and H.Glahr Co. v. Philippine Overseas Employment Administration, Mamerto Geguera and Charito Bautista-Geguera, POEA Case No. CM-90-10-1106 (July 15, 1992) 6

Philimare Shipping & Equipment and H. Glahr Co. v. Philippine Overseas Employment Administration, Mamerto Geguera and Charito Bautista-Geguera, G.R. No. 109567 (September 29, 1993)..... 7

Philippine International Trading Corporation v. M.V. Zileen Navigation Co., S.A., et al., G.R. No. 102904 (1992) 215 SCRA 309..... 8

Prado v. Sloman Neptune Shiffarts, A.B., 611 So.2d 691 (La. App. 4th Cir. 1992) 13

Vir-jin Shipping and Marine Services, Inc. vs. NIRC, et al., SCRA 577..... 5

MISCELLANEOUS

Executive Order No. 231, Creating a Presidential Fact-Finding and Policy Advisory Commission On the Protection of Overseas Filipinos..... 15

Memorandum Order No. 271 of March 21, 1995..... 15

POEA Memorandum Circular 2 Series of 1983 3

POEA Memorandum Circular 41 Series of 1989 4

POEA Memorandum Circular 55 Series of 1996 4

POEA New Rules and Regulations, Section 3, Rule II, Book V..... 6

Republic Act No. 8042 known as the Migrant Workers and Overseas Filipinos Act).....11, 15, 16, 17, 18

SUMMARY OF THE ARGUMENT

1. **The Philippine Overseas Employment Administration.**

The Philippine Overseas Employment Administration was created on May 1, 1982 through Executive Order No. 797, later amended on July 24, 1987. Among its functions is to "secure the best terms and conditions of Filipino contract workers and ensure compliance therewith". In implementing this function, the POEA periodically issues memorandum circulars setting minimum requirements or standards of compensation based on prevailing international standards and those provided under collective bargaining agreements. Its limited role in the employment process of seafarers is only to determine whether or not the minimum terms on wages and benefits are included in the employment contract.

2. **Forum Selection Clause is not enforceable in the Philippines.**

A forum selection clause is a contract of adhesion under Philippine law. Forum selection clause cannot be enforced in such a manner as to deprive a court of competent jurisdiction over the case and the parties where such jurisdiction is otherwise lawful and proper.

3. **The Philippines Overseas Employment Administration Contract.**

Benefits contained in the Philippines Overseas Employment Administration contract are not the exclusive benefits remedies available to a Philippine seafarer. A Filipino seafarer's remedy and tort are separate and distinct from the benefits conferred under the Philippine Overseas Employment Administration rules and regulations and contract of employment. The Philippine Overseas Employment Administration Contract only prescribes minimum

wage and benefits and does not prohibit higher benefits when provided by either Philippine law or that of another country.

4. **The Public Policy of the Republic of the Philippines.**

The policy of the Republic of the Philippines prohibits the enforcement of a forum selection clause. On June 7, 1995, the Philippines enacted Republic Act No. 8042 otherwise known the [sic] "Migrant Workers' Act and Overseas Filipinos Act of 1995 which took away from the Philippine Overseas Employment Administration jurisdiction over claims to Philippine workers. This Act recognizes that "Migrant Workers" such as Philippine seafarers, may elect to file their claim in a foreign country for money claims arising from the employer-employee relationship or arising from tort or delict.

SUPREME COURT OF LOUISIANA

DOCKET NO. 98-2608

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ
Plaintiff-Appellee

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL.
Defendants-Appellants

Amicus Curiae of the Republic of the Philippines on Defendant Smedvig Tankship Ltd., et al.,'s Application for Writ of Certiorari Directed to Fourth Circuit Court of Appeal Docket No. 96-CA-1013

On Appeal from the Twenty-Fifth Judicial District Court for the Parish of Plaquemines Docket No. 38-719. Division "B" Honorable William A. Roe, Presiding

---

AMICUS CURIAE BRIEF ON BEHALF OF THE REPUBLIC OF THE PHILIPPINES ON APPLICANT SMEDVIG TANKSHIPS, LTD., ET AL.,'S APPLICATION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE HONORABLE COURT:

In *Lejano vs. K.S. Bandak*, No. 97-CC-0388, this Court ruled that " . . . the employment contract drafted and approved by the Philippine government, particularly the POEA, would be enforceable under the laws of that country. This Court is not inclined to extract the forum selection provision of the employment contract, which would otherwise be enforceable under Philippine law" and that "(u)nder these circumstances, this court finds that the forum selection provision of the employment contract is not adhesive . . . " (Opinion, p. 19).

The above opinion of this Court, it is respectfully submitted, would have been correct if the case involved claims, complaints or controversies relative to the implementation and interpretation of the contract. As it was, the claim of Lejano was based on *tort* and, therefore, the forum selection clause is not applicable. The same is true in the present case of Valdez. The ruling of the Federal District Court for the Southern District of New York in *Leonardo A. Cuizon vs. Kedma, Ltd., Joshua Shipping Ltd.*, 96 Civ. 0229 (SS) (January 29, 1997), as applied by the Fourth Circuit Court of Appeal, is the correct view.

This Court further opined that the employment contract was " . . . bargained for and approved by the POEA" and that "the POEA acted on his behalf in negotiating and bargaining for the terms of the contract". (Opinion p. 18)

With due respect, however, Philippine laws, policy, and jurisprudence invariably support a different position on the matter, as shall be discussed in the succeeding submission.

1. THE NATURE AND ROLE OF THE PHILIPPINE OVERSEAS EMPLOYMENT ADMINISTRATION

The Philippine Overseas Employment Administration (POEA) was created on May 1, 1982 through Executive Order No. 797, signed by then President Ferdinand E. Marcos which abolished several bureaus in the Department of Labor and Employment including the Bureau of Employment Services, the National Seamen Board and the Overseas Employment Development Board.

On July 24, 1987, President Corazon C. Aquino issued Executive Order No. 247 reorganizing the POEA structurally and functionally. The powers and functions of the POEA under this Executive Order are:

> "SEC. 3. *Power and Functions.* – In pursuit of its mandate, the Administration shall have the following powers and functions:
>
> (a) Regulate private sector participation in the recruitment and overseas placement of workers by setting up a licensing and registration system;

(b) Formulate and implement, in coordination with appropriate entities concerned, when necessary, a system for promoting and monitoring the overseas employment of Filipino workers taking into consideration their welfare and the domestic manpower requirements;

(c) Protect the rights of Filipino workers for overseas employment to fair and equitable recruitment and employment practices and ensure their welfare;

(d) Exercise original and exclusive jurisdiction to hear and decide all claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers or overseas employment including disciplinary cases; and all pre-employment cases which are administrative in character involving or arising out of violation of recruitment laws, rules and regulations including money claims arising therefrom, or violation of the conditions for issuance of license or authority to recruit workers.

All prohibited recruitment activities and practices which are penal in character as enumerated and defined under and by virtue of existing laws, shall be prosecuted in the regular courts in close coordination with the appropriate departments and agencies concerned;

(e) Maintain a registry of skills for overseas placements;

(f) Recruit and place workers to service the requirement for trained and competent Filipino workers by foreign governments and their instrumentalities and such other employers as public interest may require;

(g) Promote the development of skills and careful selection of Filipino workers for overseas employment;

(h) Undertake overseas market development activities for placement of Filipino workers;

(i) Secure the best terms and conditions of employment of Filipino contract workers and ensure compliance therewith;

(j) Promote and protect the well-being of Filipino workers overseas;

(k) Develop and implement programs for effective monitoring of returning contract workers, promoting their re-training and re-employment of their smooth reintegration into the mainstream of national economy in coordination with other government agencies;

(l) Institute a system for ensuring fair and speedy disposition of cases involving violation of recruitment rules and regulations as well as violation of terms and conditions of overseas employment;

(m) Establish a system for speedy and efficient enforcement of decisions laid down through the exercise of its adjudicatory function;

(n) Establish and maintain close relationship and enter into joint projects with the Department of Foreign Affairs, Philippine Tourism Authority Manila International Airport Authority, Department of Justice, Department of Budget and Management and other relevant government entities, in the pursuit of its objectives. The Administration shall also establish

and maintain joint projects with private organizations, domestic or foreign, in the furtherance of its objectives."

To "secure the best terms and conditions of employment of Filipino contract workers and ensure compliance therewith", the POEA, from time to time, issues Memorandum Circulars setting minimum requirements or standards of compensation and other benefits for overseas Filipino workers, specially our seafarers, to keep them at par with prevailing international standards and those provided under collective bargaining agreements.

Thus, the POEA Memorandum Circulars always stipulate:

> "The terms and conditions provided in this revised employment contract are the **MINIMUM REQUIREMENTS** acceptable to the Ministry of Labor and Employment/Philippine Overseas Employment Administration for the employment of a Filipino seaman. They may, therefore, be improved upon by the parties concerned if the parties so desire. Such amendments or improvements to this contract however, must be put in writing annexed to the contract and submitted to the appropriate offices of the POEA when processing contracts of employment for seaman."
>
> – POEA Circular No. 2
> Series of 1983
> December 29, 1983

> "It is understood that the terms and conditions provided in this revised employment contracts [sic] are the **MINIMUM REQUIREMENTS** acceptable to this office for the overseas employment of a Filipino seaman on board

oceangoing vessels. The parties to an employment of a seaman may therefore improve on these minimum terms and conditions provided such improvements are not forced upon one party by the other through threat, coercion, intimidation or duress. They shall be made in writing and appended to this contract when submitted to this office for processing and approval. Moreover, such improvements should have prospective application."

– POEA Circular No. 41
Series of 1989
July 14, 1989

"It is reiterated that the terms and conditions provided in this revised employment contract are the **MINIMUM REQUIREMENTS** acceptable to POEA for the overseas employment of a Filipino seafarer. The parties to an employment of a seafarer may therefore improve on these minimum terms and conditions provided such improvement shall be made in writing and appended to this contract and submitted to POEA for processing and approval. Moreover, such improvements should have prospective application."

–POEA Circular No. 55
Series of 1996
December 16, 1996

Likewise, the POEA fixes or upgrades the salaries of seafarers based on rates suggested, made, and/or approved by the Joint Maritime Conference of the International Labour Organization (ILO).

Thus, the statement in *Lejano* that the "employment contracts" of Mr. Lejano at issue were bargained for by

the POEA is incorrect. At no time did the POEA bargain for their terms or conditions of Mr. Lejano's contract of employment nor the contract of employment for any Filipino seaman. The POEA's limited role in the employment process was and is only to review the employment contract(s) to determine whether or not the minimum terms on wages and benefits were included in any prospective relationship involving a Filipino seafarer and his employer.

A review of the applicable provision of our Labor Code is instructive. Section 3, Rule II, Book V of the Philippine Overseas Employment Administration (POEA) New Rules and Regulations provides:

> "Standard Employment Contract. The Administration shall undertake development and/or periodic review of contracts for land based workers and conduct regular review of standard employment contracts (SEC) for seafarers. These contracts shall provide for minimum employment standards herein enumerated under Section 2 of this Rule and shall recognize the prevailing labor and social legislations at the site of employment and international conventions. The SEC shall set the **MINIMUM TERMS AND CONDITIONS OF EMPLOYMENT**. All employers and principals shall adopt the SEC in connection with the hiring of workers without prejudice to their adoption of other terms and conditions of employment over and above the minimum standards of the administration."

As can be gleaned from the above proviso, the POEA standard form documents merely set the minimum standards of the terms and conditions of employment. The

above-cited regulation also prohibits the inclusion or enforcement of any terms or conditions in the contract of employment or collective bargaining agreement which would infringe on the right of a Filipino seafarer to seek tort damages before any court of competent jurisdiction such as a U.S. court.

Our Supreme Court expressly held in *Vir-jen Shipping and Marine Services, Inc. v. NLRC*, G.R. Nos. L-58011 & L-58012, November 18, 1983, 125 8CRA 577, 589:

> "(T)he form contracts approved by the National Seaman Board (now POEA) are designed to protect Filipino seaman not foreign shipowners who can take care of themselves. The standard forms embody the basic minimums which must be incorporated as parts of the employment contract. (Section 15, Rule V. Rules and Regulations Implementing the Labor Code.) They are not collective bargaining agreements nor immutable contracts which the parties cannot improve upon or modify in the course of the agreed period of time."

Hence, it is clear that the sole purpose of having overseas contracts of employment reviewed by the POEA is to determine whether or not such employment contracts conform to the minimum wage and benefits prescribed by the POEA. In other words, the law does not at all prohibit any modification which provides for better terms of employment, such as higher wages or other benefits voluntarily granted by the employer in the seaman's employment contract, i.e., in the case of a seaman, the vessel's shipping articles or other such shipboard employment contracts.

2. FORUM SELECTION CLAUSES NOT MUTUALLY ENTERED INTO BY THE PARTIES, ARE UNENFORCEABLE IN THE REPUBLIC OF THE PHILIPPINES.

Under Philippine law, the seaman's employment contract itself is a contract of adhesion and is not considered to be immutable. This is so because the terms and conditions embodied in the employment contract are not freely negotiated for by the Filipino seaman since the seaman does not enjoy any bargaining power with his employer concerning the terms and conditions of his employment. (See, e.g., *Vir-jen Shipping and Marine Services, Inc. vs. NLRC, et al.*, 125 SCRA 577). The fact that a Filipino's employment contract is a contract of adhesion has long been recognized by the Philippine courts. Our Supreme Court applies this rule of law in the case of *Mercury Drug Co. v. Dayao*, 117 SCRA 99:

> "The contention that employees know the terms of their employment contracts and should be bound thereto is anachronistic in this time and age. Filipino workers do not have the luxury or freedom to decline job openings or resign when the terms are onerous."

The terms of the Filipino seaman's employment, therefore, cannot be enforced against the seaman in such a way as to deprive the seaman of any right or remedy available to him under the law including the right to pursue a claim for tort damages against his employer or a vessel owner in any fora where a court has jurisdiction over the case. This includes the right of the seaman to sue his employer or the vessel owner for tort damages arising out of an on-the-job accident which occurred on board

the employer's or shipowner's vessel. Philippine courts have already recognized the fact that a Filipino seaman or his representatives may seek civil damages before the courts of the United States, including specifically the civil courts in Louisiana.

The opinion of the POEA in *Philimare Shipping & Equipment and H. Glahr Co. v. Philippine Overseas Employment Administration, Mamerto Geguera and Charito Bantista-Geguera,* POEA Case (M)-90-10-1106 (July 15, 1992) correctly applies the laws of the Philippines. In that case, a Filipino seafarer was killed while working overseas on board a vessel which was also "covered" by an "AMOSUP" collective bargaining agreement which had been negotiated between the vessel owner and the union. The POEA standard form employment contract also contained the same language which is cited by this Court in *Lejano.* In *Geguera* (POEA case), the shipowner sought to compel the survivors of the Filipino seafarer to submit their claims for adjudication before the POEA. The record in the *Geguera* case reveals that Mrs. Geguera elected to pursue her claims against the shipowner-employer before a U.S. court, namely the 23rd Judicial District Court for the Parish of Ascension, State of Louisiana. In the light of the fact that Mrs. Geguera had filed suit before a Louisiana court, the POEA correctly applied Philippine law and dismissed the shipowner-employer's complaint. The POEA stated:

> "Instead, complainant, decided to pursue his claim against the shipowners before U.S. Courts. It [sic] appearing that the complainant refuses to submit to the jurisdiction of this Office with

respect to his claim, it is but proper that his complaint be dismissed.

"WHEREFORE, premises considered, this case should be, as it is hereby ordered dismissed."

Philimare appealed this case to the Supreme Court (*Philimare Shipping & Equipment Supply, et al. vs. Philippine Overseas Employment Administration, et al.*, G.R. No. 109567). Asked by the Supreme Court to comment, the Office of the Solicitor General said:

"Further, there is no dispute that Section 1 (d), Rule 1, Book VII, of the 1991 Rule and Regulation Governing Overseas Employment vests on the POEA original and exclusive jurisdiction to hear and decide claim for death benefits. But that jurisdiction is purely on the subject matter as contra-distinguished from jurisdiction over the person of the parties. As held in Manila Railroad Co. vs. Attorney-General, 20 Phil. 523:

" 'As to the subject matter, nothing can change the jurisdiction of the court over it. None of the parties to the litigation can enlarge or diminish it or dictate when it shall attach or when it shall be removed. That is a matter of legislative enactment which none but the legislature may change. On the other hand, the jurisdiction of the court over the person is, in some instances, made to depend, indirectly at least, on the party's volition. As we have said, jurisdiction of the subject matter does not depend on the consent or objection, on the acts or omissions of the parties or any of them. Jurisdiction over the person however, may

> be conferred by consent, express or impliedly given, or it may, by an objection, be prevented from attaching or removed after it has attached.'
>
> "In the present case, private respondents by filing their Manifestation (Annex "F", Petition) to the effect that they are pursuing their claim before the U.S. courts in lieu of the POEA effectively removed that latter's jurisdiction over their persons where it had initially attached. Clearly, it is no error on the part of public respondent to order the dismissal of the complaint on that basis."

The Supreme Court resolved this appeal on September 29, 1993, and affirmed the fundamental right of the Filipino seaman's representatives to institute an action for tort damages before United States Courts. The right to seek tort damages before a competent court of law is a fundamental feature of the admiralty law of this country and all civilized countries, and the seaman's employment contract cannot, under recognized principles, be interpreted to prohibit the seaman's institution of an action for tort damages before any local or foreign court of competent jurisdiction. Copies of the Office of the Solicitor General's Comment in *Geguera* case is attached hereto as Annex "A" and the Supreme Court ruling as Annex "B".

Philippine law and the Philippine courts also recognize the fact that agreements on venue, commonly known as "forum selection clauses" contained in any maritime contract cannot be used to oust a court of its jurisdiction over a case, where the court otherwise has lawful jurisdiction over the case and the parties. This is true for two reasons. The first reason is that jurisdiction over a case is

conferred by law and private parties by way of an agreement and/or stipulation may not deprive a court of its lawful jurisdiction. The second commonly stated reason for denying enforcement of a forum selection clause is that the clause is in essence merely an objection to venue. Objection to venue can be waived. Waiver can occur as a result of many actions which constitute a lawful appearance by the party before the court or where the party invokes the power of the court to grant him some form of interim or interlocutory relief. This conduct specifically includes filing a motion to vacate or discharge a writ of attachment, posting of bond or security to dissolve the writ and filing a reply to the opposition to dissolution of the writ of attachment.

A recent admiralty case decided by our Supreme Court is illustrative of these points. In *Philippine International Trading Corporation v. M.V. Zileen Navigation Co., SA., et al.*, G. R. No. 102904 (1992), the defendant shipowner sought to enforce a contractual forum selection clause. In that case, the parties entered into an agreement which also stipulated that "disputes arising out of the contract" were to be submitted exclusively to the High Court of Singapore. Following the loss of the vessel's cargo, the plaintiff filed suit in the Regional Trial Court (equivalent of the U.S. District Court). The defendant filed a motion to dismiss the action in favor of the High Court in Singapore. The lower court granted the motion to dismiss. Plaintiff went to the Supreme Court on a petition to review by certiorari. In reversing the trial court, our Supreme Court ruled:

"In the petition at bar, petitioner insists that paragraph 10 of the covenant is an illegal agreement on *competencia* because it deprives Philippine courts from handling any case that may arise under the agreement. x x x

"x x x

"While We perceive merit in the petition, it must be impressed upon petitioner that paragraph 10 of the Agreement may not be equated with *competencia* and neither does it suggest that Philippine courts are divested of authority by reason of the parties' express preference to vest jurisdiction in the High Court of Singapore. Indeed, it was emphasized in *International Harvester Co. vs. Hamburg American Line,* (42 Phil. 845 [1918]):

> 'The only other point raised by the bill of exceptions, which we deem it necessary to notice, is based on a provision in the bill of lading to the effect that all disputes arising under the contract are, at the option of the defendant company, to be decided according to German law and exclusively by the Hamburg courts. From this it is argued that the Court of First Instance erred in assuming jurisdiction of the action and that the case should have been decided in accordance with the principles of German law.
>
> 'It can not be admitted that a provision of this character has the effect of ousting the jurisdiction of the courts of the Philippines Islands in the matter now before it. **An express agreement tending to deprive a court of jurisdiction conferred on it by law is of no effect.** *Molina vs. De la Riva,* 6 Phil. 12.)" (p. 855)'

"In resolving this problem, which is analogous to the scenario that obtained in *Atlas Developer and Steel Industries, Inc. vs. Sarmiento Enterprises, Inc.* (184 SCRA 153 [1990]), petitioner must heed the reminder that:

> ' . . . Although it provides that a City Court of Manila shall have 'jurisdiction' over a legal action arising from the contract, the parties must have intended to fix the venue only, **for jurisdiction over an action is conferred by law, and may not be changed by mere agreement of the parties** (*Calimlim, et al. vs. Ramirez, et al.*, 118 SCRA 399; *De Jesus, et al vs. Garcia et al.*, 19 SCRA 554)." (p. 155)

"x x x

"WHEREFORE, the petition is hereby GRANTED. The order dated November 26, 1991 is SET ASIDE and the case is hereby REMANDED to the court of origin for further proceedings.

"SO ORDERED."

– 215 SCRA 309, 312-313, 315

In fine, the forum selection clause which are embodied in the employment contracts do not preclude the seafarer from filing a tort case wherever he can obtain jurisdiction over his employer or shipowner.

3. THE POEA CONTRACT

Regarding the remedies available to Filipino seafarers, it must be stressed that the benefits set forth in the employment contracts and POEA regulations are not the

exclusive benefits or remedies available to a Filipino seafarer. The POEA contractually-based benefits are merely guaranteed minimum benefits and a Filipino seafarer also enjoys remedies under Philippine tort law arising from the provisions of the Philippine Civil Code and maritime law. A Filipino seafarer's remedies in tort are separate and distinct from the benefits conferred under the POEA rules and regulations or any contract of employment or collective bargaining agreement. Any argument to the contrary is completely erroneous under Philippine law.

The standard form POEA contract of employment involved in this case, particularly paragraph 4, reads:

> "All claims, complaints or controversies relative to the implementation and interpretation of this overseas employment contract shall be exclusively resolved through the established Grievance Machinery in the Revised Employment Contract for seafarers, the adjudication procedures of the Philippine Overseas Employment Administration and the Philippine Courts of Justice, in that order".

Contrary to the Opinion in *Lejano*, the standard form POEA contract of employment does not contain either a choice of law or forum selection clause. Such clauses would violate not only the public policy of the Philippines but would also contravene our statutory laws. It is important to note that the cited language clearly and unambiguously refers only to issues or claims regarding the interpretation or implementation of the agreement itself and clearly does not refer or pertain to tort actions. Our government is aware of the argument made before courts of the United States by legal representatives of

foreign employers and shipowners that this cited language applied to tort claims. This assertion is entirely untrue because the POEA is devoid of jurisdiction over tort claims. Our government is also aware of the argument that this cited language constituted a "forum selection clause" which granted the POEA "exclusive" or "mandatory jurisdiction over the tort claims of Filipino seafarers. Again, this assertion is incorrect for the reasons heretofore stated.

4. THE PUBLIC POLICY OF THE REPUBLIC OF THE PHILIPPINES

A careful review of the decisions in *Lejano* and in *Barcelona v. Sea Victory Maritime, Inc.* 619 So.2d 741 (La.App. 4th Cir. 1993) and *Prado V. Sloman Neptune Schiffarts, A.G.* 611 So.2d 691 (La.App. 4th Cir. 1992) indubitably reveals that the statements and conclusions contained therein pertaining to Philippine Law and the role and authority of the POEA should be addressed with specific clarification on very important matters.

With respect to the role and authority of the POEA, the following disquisition is relevant. There were complaints from various sectors that the POEA was not adequately serving or protecting the rights of Filipino seafarers. In response to this problem, Republic Act No. 8042 otherwise known as the "Migrant Workers and Overseas Filipinos Act of 1995, (hereinafter referred to as Migrant Workers Act, for brevity) enacted on June 7, 1995, took away from the POEA jurisdiction over all claims of Filipino overseas workers, including seafarers. This Act is the most current expression of Philippine law

and public policy relating to Filipino overseas workers, including seafarers. It expressly recognizes the right of the Filipino seafarer to institute suit against his employer or shipowner before the court of foreign countries. The Act provides in part:

> "SEC. 23. **Role of Government Agencies.** – The following government agencies shall perform the following to promote the welfare and protect the rights of migrant workers and as far as applicable, all overseas Filipinos:
>
> "(a) Department of foreign Affairs. – The department, through its home office or foreign posts, shall take priority action or make representation with the foreign authority concerned to protect the rights of migrant workers and other overseas Filipinos and extend immediate assistance including the repatriation of distressed or beleaguered migrant workers and other overseas Filipinos:
>
> "(b) Department of Labor and Employment – The Department of Labor and Employment shall see to it that labor and social welfare laws in the foreign countries are fairly applied to migrant workers and whenever applicable, to other overseas Filipinos including the grant of legal assistance x x x.
>
> "x x x
>
> "SEC. 24. **Legal Assistant for Migrant Workers Affairs.** – There is hereby created the position of Legal Assistant for Migrant Workers Affairs under the Department of Foreign Affairs who shall be primarily responsible for the assistance services to be provided to Filipinos migrant workers as well as overseas Filipinos in

distress. He shall have the rank, salary and privileges equal to that of an undersecretary of said Department.

"Among the functions and responsibilities or [sic] the aforesaid Legal Assistant are:

(a) To issue the guidelines, procedures and criteria for the provision of legal assistance services to Filipino migrant workers;

(b) To establish close linkages with the Department of Labor and Employment, the POEA, the OWWA and other government agencies concerned, as well as with non-governmental organizations assisting migrant workers, to ensure effective coordination and cooperation in the provision of legal assistance to migrant workers;

(c) To tap the assistance of reputable law firms and the Integrated Bar of the Philippines and other bar associations to complement the government's efforts to provide legal assistance to our migrant workers;

(d) To administer the legal assistance fund for migrant workers established under Section 25 hereof and to authorize disbursements therefrom in accordance with the purposes for which the fund was set up; and

(e) To keep and maintain the information system as provided in Section 20.

"The Legal Assistant for Migrant Workers Affairs shall have the authority to hire private lawyers, domestic or foreign, in order to assist him in the effective discharge of the above functions."

Copy thereof is attached hereto as Annex "C".

Thus, contrary to the statements made in *Lejano*, it is the public policy of the Philippines to protect the right of a Filipino seafarer to institute suit against his employer or shipowner before any court of competent jurisdiction whether domestic or foreign Philippine law does not in any way limit the right of an injured Filipino seafarer to pursue his employer in a foreign forum, including specifically the courts of the United States and the State of Louisiana.

We have thoroughly reviewed and completely concur with the opinion of experts Justice Nestor Alampay and Professor Ruben Balane submitted in evidence in this case, establishing that tort claims are not within the jurisdiction of POEA. The POEA is only possessed with jurisdiction over money claims arising from the employer-employee relationship covered by the POEA contracts. The POEA has no jurisdiction over actions arising from torts.

In fact, while the old POEA employment contract provided:

> "4. All claims, complaints or controversies relative to the implementation and interpretation of this overseas employment contract shall be exclusively resolved through the established Grievance Machinery in the Revised Employment Contract for seafarers, the adjudication of the Philippine Overseas Employment Administration and the Philippine Courts of Justice, in that order",

the new POEA employment contract, adopted through POEA Memorandum Circular No. 1996, Series of 1996, following the enactment of the Migrant Workers Act, now provides:

> "4. All claims, complaints or controversies relative to the implementation of the overseas employment contract shall be resolved through the established Grievance Machinery in the Revised Employment Contract for Seafarers. If result of the procedure is unsatisfactory to any of the parties, it may be appealed to the management of the Company or with the Philippine Labor Attache or consular officer overseas. This procedure shall be without prejudice to any action that the parties may take before the appropriate authority".

Simply said, the adjudicatory machinery and procedure of the POEA at issue in the *Lejano* no longer exist today.

In *Kenneth McKenzie, et al. vs. Hon. Emeterio C. Cui, et al.*, G.R. No. 48831 (Feb. 6, 1989), the Philippine Supreme Court expressly ruled that the National Seaman's Board (now POEA) has no jurisdiction over tort claims. In that case, the Supreme Court said:

> "On January 15, 1976, private respondent (Aguedo Lomod), a licensed seaman filed with the court *a quo* a complaint for recovery of certain sums of money, with damages against petitioners Kenneth McKenzie and B. M. Kraamer as Administrative Manager and Master of M.V. Carbay, respectively, and its operator Wallem Philippines, pursuant to Article 2180 of the Civil Code. In his complaint, private respondent alleged that while M.V. Carbay was dry-docked

in Aichi, Japan, he was attacked by his co-worker, an alleged protégé of B.M. Kraamer.

"Private respondent alleged that without investigation, B.M. Kraamer summarily dismissed him without paying his salary and thereafter compelled to take the train from Aichi to Yokohama and therefrom to Manila by Japan Airlines, incurring expenses therefor in the amount of $320.00. This incident was followed by a letter of Kenneth McKenzie to the Commandant of the Philippine Coast Guard asking that private respondent be refused clearance for future employment. Private respondent added that it was only on October 21, 1976 that the Philippine Coast Guard issued the clearance.

"Private respondent in his complaint asked that judgment be rendered in his favor by:

> 'Ordering the defendants jointly and severally to pay unto the plaintiff: a) P2,240 as reimbursement for his transportation expenses from Aichi, Japan to Yokohama Japan, thence, to Manila; b) P1,000.00 as actual damages for reasonable attorney's fees he incurred in the case against him with the Philippine Coast Guard; c) P15,390.00 as loss of his earning capacity for six (6) months starting from April 28, 1976 until he was finally issued the much needed 'clearance' by the Philippine Coast Guard; d) P5,000.00 as reasonable attorney's fees in this particular instance; e) Moral damages in an amount as this Honorable Court may award unto him; and f) costs of suit.' (p. 18, rollo)

"On November 22, 1976, petitioners filed a motion to dismiss for lack of jurisdiction and

alleged that the National Seamen's Board has the exclusive jurisdiction over cases in connection with the employment of Filipino Seamen on board vessels engaged in overseas trade (Sec. 12, Rule V, Implementing Rules and Regulations of the Labor Code).

"On July 6, 1978, respondent judge denied petitioners' motion to dismiss. Petitioners moved to reconsider but the same was denied on August 7, 1978.

"Hence, this appeal on a pure question of law.

"The sole issue is whether the court *a quo* has jurisdiction over this case.

"We are not persuaded by petitioners' argument that the National Seamen's Board has jurisdiction. A perusal of private respondent's complaint reveals his clear intention to seek and claim protection under the Civil Code and not under the Labor Code. We note that the items demanded are not labor benefits such as wages, overtime or separation pay, but are items claimed as natural consequences of such dismissal. (*Singapore Airlines Ltd. vs. Pano*, No. L-47739, June 22, 1983, 122 SCRA 671) Private respondent's complaint is denominated as 'damages' as a consequence of his alleged summary dismissal by petitioners. Moreover, private respondent in his opposition to petitioner's motion to dismiss, cites Articles 2197, 2199, 2200, 2219 and adds the relevant articles on Human Relations; Articles 19, 21, 24, and 32 to support his claim for damages.

"The *Quisaba vs. Sta. Ines Melale Veneer and Plywood, Inc.* case (No. L-38088, August 30, 1974,

> 58 SCRA 771) finds relevance to the case at bar. In that case we said: 'Although the acts complained of seemingly appear to constitute 'matters involving employee-employer' relations as Quisaba's dismissal was severance of a pre-existing employee-employer relations, his complaint is grounded not on his back wages, but on the manner of his dismissal and the consequent effects of such dismissal.'
>
> "Thus, gleaned from private respondent's complaint, this case is clearly within the purview of Civil Law. Consequently, the regular court a quo has jurisdiction and not the National Seamen's Board.
>
> "Accordingly, the Court Resolved to AFFIRM the assailed order of public respondent judge dated July 6, 1978, denying petitioner's motion to dismiss. The case is ordered REMANDED to the Regional Trial Court of Manila for further proceedings."

As a matter of fact, the POEA has lost jurisdiction over all such money claims and/or claims for contractual benefits of any nature, involving an employer-employee relationship as discussed by our Supreme Court in *Javier V. Court of Appeals,* 214 SCRA 572 (1992). Upon the passage of the Migrant Workers Act, money claims are now cognizable exclusively by the labor arbiter of the National Labor Relations Commission (NLRC):

> "Sec. 10 Money Claims – Notwithstanding any provision of law to the contrary, the Labor Arbiter of the National Labor Relations Commission (NLRC) shall have the original and exclusive jurisdiction to hear and decide, with ninety (90) calendar days after the filing of the

> complaint, the claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino Workers for overseas deployment including claims for actual, moral, exemplary and other forms of damages. x x x"

On March 20, 1995, after a Filipino domestic helper Flor Contemplacion was executed in Singapore for the alleged killing of another Filipino, former President Fidel V. Ramos, promulgated Executive Order No. 231 creating a Presidential Fact-Finding and Policy Advisory Commission on the Protection of Overseas Filipinos, a copy of which is attached hereto as Annex "D". President Ramos appointed Justice Emilio A. Gancayco as Chairman of the Commission and six other members coming from different sectors of society under Memorandum Order No. 271 of March 21, 1995, a copy of which is attached as Annex "E". The Commission had since been known as the Gancayco Commission.

The Commission's mandate was not only to determine the circumstances that led to the execution of Flor Contemplacion but also to conduct a fact finding investigation of the plight of the Filipino overseas workers (OCWs) and to recommend measures that need to be undertaken by the executive branch and/or Congress. Among the findings of the Gancayco Commission is that the POEA did not effectively perform its task, of adjudicating the money claims of OCWs arising from their employment contracts. It was thus recommended, among other changes, that jurisdiction over said claims be transferred from the POEA to the labor arbiters of the NLRC. Hence, this transfer of jurisdiction is provided for in the

Migrant Workers Act, many provisions of which are based on the recommendations of the Gancayco Commission.

Under Philippine law, where courts have concurrent jurisdiction, the court first taking cognizance acquires jurisdiction to the exclusion of all other courts, foreign or domestic. This principle applies directly in cases such as *Lejano* due to the fact that the seafarer has or had instituted suit before a U.S. court. In such a case, the Philippine courts do not have subject matter jurisdiction over the seafarer's case and the Philippine courts may be compelled to decline jurisdiction over the claims. The conclusion made by the Louisiana appellate courts that Philippine courts could or would accept jurisdiction over cases which had been originally filed before Louisiana or U.S. courts is, therefore, incorrect.

Although the Labor Arbiters of the National Labor Relations Commission of the Philippines have exclusive jurisdiction over the money claims arising from employment contracts, such jurisdiction may be exercised only within the territorial jurisdiction of the Philippines.

Similarly, the U.S. courts have exclusive jurisdiction over such money claims and claims arising from tortuous act committed within their territorial jurisdiction or where a claim has been first instituted before a U.S. court which has acquired jurisdiction over the subject matter and the defendants. Thus, on the assumption that the Philippine courts, other foreign courts and the Louisiana court(s) have concurrent jurisdiction over the tort claims of a Filipino seafarer, it is a well-settled rule that the court

first taking cognizance of the case does so to the exclusion of all other courts, foreign or domestic. The same rule applies even on the extreme assumption that the labor arbiters would also have jurisdiction over some claims raised in a particular case. Thus, in the words of our Supreme Court in the case of *Laquian V. Baltazar*, 31 SCRA 552 (1970).

> "Even in cases of concurrent jurisdiction, it is also axiomatic that the court first acquiring jurisdiction excludes the other courts. (citing *Grafton v. U.S.*, 11 Phil. 761, 791; *Valdez V. Lucero*, 76 Phil. 356; *Braca v. Tan*, 84 Phil. 582; *PP. v. Livard*, 94 Phil. 771; *Lumpay V. Hon. Moscojo*, 105 Phil. 968, 972-72; *Alunajen V. Valera*, 107 Phil. 224, 145)".

As a matter of fact, the Migrant Workers Act contemplates that "migrant workers", such as Filipino seafarers, may elect to file their claim in a foreign country even for those money claims arising from the employer-employee relationship or arising from tort or a delict. Under Section 24 of the act (Annex "D"), the position of a Legal Assistant for Migrant Workers Affairs was created under the Departure of Foreign Affairs which "shall be primarily responsible for the provision and over all coordination of all legal assistance to be provided to Philippine migrant workers as well as overseas Filipinos in distress." A legal assistance fund in the amount of P100 million was set aside for this purpose. The purpose of the fund was to assist Filipino workers in filing their claims before foreign courts of competent jurisdiction.

Again, this statutory provision was based on the findings and recommendations of the Gancayco Commission. The Commission found that most overseas workers had not been able to successfully enforce or recover their money claims or other complaints against their foreign employers through the POEA or the Philippine courts, and that the solution to this problem was to assist the workers in filing their claims or complaints in the appropriate forum in the country where the money claim arose or the tortuous act was committed or in the case of maritime cases wherever jurisdiction over the defendant could be obtained. The Commission also recognized that one of the many insurmountable difficulties faced by the Filipino seafarer in attempting to successfully prosecute a claim against a foreign employer or shipowner before the civil courts of the Philippine is caused by the limitation on the exercise of jurisdiction over non-resident defendants by Philippine courts. Philippine courts lack the authority to compel non-resident defendants and witnesses to appear before them and Philippines law does not recognize the principle of extra-territorial service of process or application of Philippine law. A Filipino seafarer who seeks to recover tort damages from a non-resident employer or shipowner must, therefore, bring his claim before the courts of a foreign country where the employer may be served with judicial process under the laws of the forum or where the shipowner's vessel may be seized through judicial process.

The Gancayco Commission also found that our Philippine embassies abroad failed to extend adequate legal assistance to many OCWs who desire to file their complaints against their employer or to defend themselves

against suits filed by their employers or other parties. Hence, the creation of this legal mechanism under the Migrant Workers Act, whereby all Philippine embassies or consulates abroad can now extend free legal assistance to Filipino OCWs in distress.

From the foregoing, it is clear that while under Section 10 of the Act, the Labor Arbiters of the National Labor Relations Commission have (like the POEA before) the original and exclusive jurisdiction within the Philippines over x x x" claims arising out of an employer-employee relationship or by virtue of law or contracts involving Filipino workers for overseas employment including claims for actual, moral, exemplary and other forms of damages," even for purposes of argument that it cover claims for damages arising from tortuous acts, the Philippine laws recognize the right of the overseas workers to file such claim or complaint against their employers or other person other person or entity, in either the country where the seafarer suffered the injury, or wherever the seafarer can obtain jurisdiction over the employer or shipowner.

Finally, for this court's review, the ruling of the Federal District Court for the Southern District of New York in the case titled *Leonardo A. Cuizon v. Kedma, Ltd., Joshua Shipping Ltd.*, 96 civ. 0229 (SS) (Jan. 29, 1997) (attached hereto as Exhibit F) correctly expresses Philippine law in that:

> (a) Under Admiralty law it is abundantly clear that a seaman's contract is the shipping article the seaman signs upon entering the vessel. It is not the POEA contract invoked by the defendants. The said seaman's shipping article

was signed in Mexico and not in the Philippines. Thus, it is this shipping article contract that controls, which does not contain a forum selection clause, not the POEA contract.

(b) A reading of the forum selection clause of the POEA contract limits the same to "claims, complaints or controversies relative to the implementation and interpretation of this overseas employer contract. Plaintiff's claim is a claim in tort, not a claim relative to the implementation or interpretation of POEA contract nor the shipping article contract.

(c) The POEA employment contract is a contract of adhesion, a fact which the Philippines Supreme court has recognized negates the effect of an even otherwise valid and enforceable forum selection clause.

(d) The Philippine courts have expressly allowed plaintiff to seek remedy in the United States courts for tort committed against Philippines signatories of POEA contracts. This is shown not only by the decisions of the Supreme Court already referred to by the experts Messrs. Alampay and Balane but most recently by the creation of the above discussed office of free legal assistance for distressed Filipinos abroad. (Section 34 of the Republic Act No. 8042, Annex "B") Section 13 thereof also reiterates the need for free legal assistance to be extended to migrant workers abroad (supra).

(e) The affidavits of Messrs. Alampay and Balane opining that Philippine law does not recognize the validity of forum selection clauses in general since such clauses would operate to unlawfully deprived [sic] the courts of jurisdiction over the case and the parties when such

jurisdiction were otherwise lawful and proper is a correct expression of Philippine law and jurisprudence.

(f) Messrs. Alampay and Balane correctly stated in their affidavit that the Philippine courts have no available compulsory process to compel non-resident defendants and/or witnesses to appear before them no [sic] do they have the ability to enforce awards rendered against non-resident defendants who do not have property in the Philippines. The *Cuizon* court aptly found that the Philippines, as an alternative forum, cannot assure the plaintiff will receive an adequate remedy for his claim. This holding is confirmed by the findings of the Gancayco Commission.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Court affirm the decisions of the trial court and appellate court in this case.

Makati City, October 21, 1998.

Respectfully submitted:

/s/ Ricardo P. Galvez
RICARDO P. GALVEZ
Solicitor General
IBP No. 463184, Jan. 7, 1998

/s/ Amy C. Lazaro-Javier
AMY C. LAZARO-JAVIER
Assistant Solicitor General
O.R. 1411 (Lifetime Membership)

/s/ Romeo R. Ramolete
ROMEO R. RAMOLETE
Solicitor
IBP No. 365312, 1-25-94

Republic of the Philippines
Office of the Solicitor General
Amorsolo St., Makati City, Philippines

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the above and foregoing Amicus Curiae Brief has been this day served upon counsel of record by Federal Express Int'l Air Way bill No. 400-7091 6576 and 400-7091 6565 and properly addressed.

Makati City, Philippines, this 26th day of October, 1998.

/s/ Ricardo P. Galvez
RICARDO P. GALVEZ
Solicitor General

/s/ Amy C. Lazaro-Javier
AMY C. LAZARO-JAVIER
Assistant Solicitor General

/s/ Romeo R. Ramolete
ROMEO R. RAMOLETE
Solicitor

25TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-719 DIVISION "B"

NESTOR ABUAN, AS GUARDIAN ON
BEHALF OF CARLOS VALDEZ

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL.

FILED: Nov. 15, 1994 /s/ Merlene M. B. Cornin
DEPUTY CLERK

JUDGMENT ON EXCEPTIONS AND MOTIONS

This mater [sic] was called for hearing on November 8, 1994. Before the Court are various Exceptions and motions filed by Defendants Smedvig Tankships, Ltd. et al (hereinafter referred to as "Smedvig"). After considering the written memoranda filed by the parties, the affidavits and evidence submitted herewith and the argument of counsel, the Court has made the following rulings.

Concerning the exceptions and motions for dismissal filed by Defendant Smedvig, the Court rules as follows:

Defendant Smedvig's exception of forum non conveniens is hereby denied;

Defendant Smedvig's exception or motion to dismiss based upon a forum selection clause is denied;

Defendant Smedvig's exceptions of no cause of action and no right of action are denied. The Court, having considered the Lauritzen-Rhoditis factors to determine

the applicable choice of law, finds that those factors predominate in favor of this Court applying the law of this country and of this State to this Plaintiff's claims and there is no strong indication that Filipino law or Norwegian law should be applied in this factual situation; and

The Court further holds that there is subject matter jurisdiction over this action.

Before this Court is also a motion for protective order filed by Amoco Corporation. This motion is denied as moot, in light of the stipulation by the Plaintiffs withdrawing the requested discovery which was the subject of the motion for protective order;

Finally, Plaintiff has moved this Court for an order compelling responses from Defendant Smedvig for outstanding discovery. This Motion to Compel is hereby continued without date. Counsel for Plaintiff shall confer with counsel for Defendant Smedvig to attempt to resolve any objections to the requested discovery. If the parties cannot amicably resolve this discovery dispute, then either party may reset the Motion to Compel for hearing.

Thus rendered on November 8, 1994 in open court.

Judgment signed in chambers at Pointe a la Hache, Louisiana, on this 15th day of November, 1994.

/s/ Illegible
JUDGE

A TRUE COPY

/s/ Merlene M. B. Cornin
Dy. Clerk of Court

25th JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

CASE NO. 38-719

DIVISION "B"

VERSUS

SMEDVIG TANKSHIPS, LTD., ET AL
AMOCO CORPORATION

(EXCEPTIONS AND MOTIONS)

Testimony and Notes of Evidence taken before the HONORABLE WILLIAM A. ROE, Judge presiding, on Tuesday, November 8, 1994.

APPEARANCES:

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AND
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Attorney for Amoco Corporation

REPORTED BY:

PETER P. BORRELLO, JR.,
Official Court Reporter

THE COURT:

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Those leave the other issues to be looked at. And one is the choice of law and Barcelona and Prado's and the other cases allow me to look at Lauritzen and Hellenic Lines and factors to determine whether or not under a choice of law analysis this would be a proper forum. And I agree whole-heartedly with the proposition that the factors, the eight factors set forth in those cases do not have equal weight. And in viewing those factors ther [sic] terms of the factual scenario that has been presented in this case, I find that they predominate in favor of this Court applying the law of this country and of this state to this Plaintiff's claims and that there is no strong indication that Filipino law or Norwegian law should be applied in this factual situation.

* * *

Now, in the situation – the burden – the road-block presented by Barcelona and Prado to this Court hearing this case, if in fact those cases are still valid is the Forum Selection Clause. Now, let's assume that Barcelona and Prado are still the law. Under a Forum Selection Clause, Prado and Barcelona would say that the clause in this situation should be adhered to on its face and that the Philippines should be the proper place for this Plaintiff to litigate his claims, however, Barcelona and Prado would

allow me to review the situation in terms of the jurisprudence represented by "BRENNAN VERSUS ZUPATO," for instance and to determine whether or not a trial in a contractual forum and in this case, the Philippines, would be so difficult or inconvenient for the Plaintiff that he would, for all practical purposes be deprived of his day in court. In Barcelona and Prado, the situation was such that it would almost have been ludicrous to suggest that the case should be litigated in this court because no one was here. There was absolutely no connection with this forum or this country so as to allow litigation in this court. I find that the factual situation in this matter is completely reversed. It would be absolutely factually ridiculous to suggest that either party, any party, Defendants or Plaintiff to require them to litigate in the Philippines would be unwarranted under the factual situation presented. Because of the peculiar situation presented by the Plaintiff's physical condition, the Court finds that it would be in fact gravely difficult and inconvenient for the Plaintiff to be required to litigate in the Philippines and that he would be for all practical purposes deprived of his day in court if required to do so. Now, that is assuming that Prado and Barcelona is not distinguishable or that they are still valid rules of law. I am particularly intrigued by the fact that Barcelona was a contract case and that this is a personal injury case and, therefore, I think that there are significant distinctions to be drawn from that.

I am also intrigued by the suggestion not made to me in the Barcelona case nor argued to the 4th Circuit Court of Appeals that the Forum Selection Clause is used by the Filipino tribunal as a procedural aspect of the Filipino

law, rather than as a matter of substantive law of that forum. It is quite possible that on that basis the Court, even if a factual situation would command respect for the Forum Selection Clause in this seaman's contract, it is very possible that the Court would ignore that Forum Selection Clause as the procedural law of the country in the Philippines, the Republic of the Philippines or whatever it may be and would instead determine that the substantive law of this state and of this country would dictate that this is the proper Forum Tribunal for this Plaintiff to litigate his claims.

Therefore, the Court will deny the Exceptions in this matter, specifically ruling that Forum Non-Conveniens is not applicable to this situation and it is rejected and that under the Forum Selection Clause Analysis that the Plaintiff does state a cause of action and does have a right of action to litigate his claims in this country.

The Court specifically rules that there is subject matter jurisdiction over this action based on the analysis that the Court has just made.

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NO. 95-CA-0629

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

NESTOR ABDUAN, [sic] AS GUARDIAN ON BEHALF OF CARLOS VALDEZ

versus

SMEDVIG TANKSHIPS, LTD., ET AL

In Re: SMEDVIG TANKSHIPS, LTD, ET AL

Applying for: SUPERVISORY WRITS

Directed to: HONORABLE WILLIAM A. ROE, JUDGE, 25th JUDICIAL DISTRICT COURT, PLAQUEMINES PARISH DIVISION "B", C.D.C. #38-719

STAY ORDER LIFTED; WRIT APPLICATION DENIED

(Filed Jul. 28, 1995)

Relator's application for supervisory writs is denied.

The trial court made a factual finding in light of *Bremen v. Zapata* that distinguished the case at bar from the situation in *Prado v. Sloman Neptun Schiffahrts A.G.*, 611 So.2d 691 (La. App. 4th Cir. 1992) *cert. denied*, 613 So.2d 986 (La. 1993) and *Barcelona v. Sea Victory Marine, Inc.*, 619 So.2d 741 (La. App. 4th Cir. 1993). We cannot say that he abused his discretion so as to require us to exercise our supervisory jurisdiction. Relator has an adequate remedy on appeal.

The Order of May 12, 1995, staying all proceedings is rescinded, and the stay is lifted.

New Orleans, Louisiana this 28th day of July, 1995.

/s/ Illegible
JUDGE PATRICIA RIVET MURRAY

/s/ Illegible
JUDGE JOAN BERNARD ARMSTRONG

LANDRIEU, J. Dissents with reasons.

I would maintain the stay order and grant the realtor's application for supervisory writs. *See Barcelona v. Sea Victory Maritime, Inc.*, 619 So.2d 741, 743 (La. 4th Cir. 1993); *Prado v. Sloman Neptun Schiffahrts A.G.*, 611 So.2d 691 (La. App. 4th Cir. 1993).